

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
New Part 4 of the Commission's Rules	)	ET Docket No. 04-35
Concerning Disruptions to Communications	)	

**COMMENTS OF ERICSSON INC**

Ericsson Inc ("Ericsson") hereby submits comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking*, released February 23, 2004 ("*NPRM*").<sup>1</sup> The *NPRM* seeks comment on a proposal to extend disruption reporting requirements to communications providers who are not wireline carriers. The Commission asserts that it is appropriate to adapt and apply outage reporting requirements more broadly across all communications platforms because the nation's critical communications infrastructure has evolved to include all of them. With all types of communications providers involved in protecting homeland security, public health, and public safety, as well as the economic well being of our nation, the Commission believes that it must have rapid, full, and accurate information on all communications service disruptions.

Ericsson supports the Commission's objectives in promoting homeland security, network protection, and reliability. Although the *NPRM* contemplates extension of outage reporting requirements to many services, Ericsson limits its comments to wireless services, as contemplated in Section 4.3(b) of the proposed rules.

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<sup>1</sup> *Notice of Proposed Rulemaking, In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, 19 FCC Rcd. 15761 (rel. Feb. 23, 2004).

Ericsson agrees with the Commission that wireless services now enjoy great importance as part of our nation's critical communications infrastructure. The significance of wireless services is illustrated by the increasing prominence of Wireless Priority Service ("WPS") in national security and emergency preparedness telecommunications.<sup>2</sup> In fact, the level of deployment and availability of wireless networks has led Ericsson to encourage first responders and medical personnel to use commercial wireless networks for safe, secure, and reliable communication, including in times of crisis.<sup>3</sup>

As a supplier of complete communications solutions, from base stations to building, servicing, and managing networks, Ericsson comments on two aspects of the *NPRM*. Ericsson recommends that the Commission:

- Continue its long-standing policy that licensees are responsible for compliance with the Commission's rules; and
- Require licensees to identify the name and type of equipment in the outage report only if the equipment is found to have contributed to the occurrence of the outage.

#### **I. Licensees Should be Responsible for Reporting.**

The Commission proposes to extend the reporting requirements of Section 63.100 of the Commission's rules, not just to more classes of carriers, but to unrelated third parties as well. Specifically, Section 4.3(b) of the proposed rules includes "non-affiliated entities that maintain or provide communications systems or services used by the

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<sup>2</sup> *NPRM*, n. 39.

<sup>3</sup> See, Comments of Ericsson Inc, *In the Matter of Facilitating Opportunities for Flexible, Efficient, and Reliable Spectrum Use Employing Cognitive Radio Technologies, Authorization and Use of Software Defined Radios*, ET Docket No. 03-108, ER Docket No. 00-47 (Terminated), (fil. May 3, 2004), pp. 10-13.

provider in offering such communications.”<sup>4</sup> The Commission should clarify that any requirement imposed on wireless service providers to report outages extends only to licensees. Only licensees are in a position to provide full and complete information about their networks to the Commission. Certainly, any licensee may contract with an unrelated third party to perform services for it, including the provision of the actual outage information.<sup>5</sup> But, in the end, licensees control the operation of their networks.

Ericsson’s objection to extending reporting responsibilities to unrelated third parties is grounded in the Commission’s long-standing policy that licensees be solely responsible for compliance with the rules. In *Trustees for the University of Pennsylvania*,<sup>6</sup> the D.C. Circuit noted:

The Congress demonstrated its special concern that ultimate responsibility for a station's operation rests with the party licensed by this Commission by imposing requirements that licensees notify the Commission when a 'transfer of control' over a station was proposed and by further requiring a Commission finding that such a transfer will be in the public interest, convenience, and necessity before it can be consummated.

Repeatedly, the Commission has stated:

A licensee is charged with the responsibility of knowing and complying with all the requirements of the Act and the Commission’s Rules. That responsibility is not lessened, mitigated or excused because the licensee relied upon the erroneous advice of an employee or independent contractor.<sup>7</sup>

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<sup>4</sup> *NPRM* at Appendix A.

<sup>5</sup> If an unrelated service provider fails to provide the necessary outage information, the licensee may seek its recourse under the services agreement. The Commission has observed on many past occasions, claims based on state law and in the nature of private disputes are better left for resolution in the appropriate judicial fora. See, *Listeners’ Guild, Inc. v. F.C.C.*, 813 F. 2d 465, 469 (D.C. Cir. 1987); *Memorandum Opinion and Order, In the Matter of Applications of O.D.T. International and Wyoming W.C. Lai, for involuntary assignments of Station KILU-FM*, 9 FCC Rcd 2575, 2576 (rel. Jun. 9, 1994).

<sup>6</sup> *Trustees for the University of Pennsylvania*, 69 FCC 2d 1394, 1396 (D.C. Cir. 1978).

<sup>7</sup> *Memorandum Opinion and Order, In the Matter of Maria L. Salazar, Licensee, Station KTCM (FM), Kingman, Kansas*, File No. EB-01-KC-174; NAL/Acct. No. 200232560011; FRN 0003-7578-12, 19 FCC Rcd. 5050, (rel. Mar. 16, 2004), citing, *In the Matter of the Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd. 17087, (rel. Jul. 28, 1997), *recon. denied*, 15 FCC Rcd. 303 (rel. Dec. 18, 1999) (“*Forfeiture Policy Statement*”); *Seawest Yacht Brokers*, 9 FCC Rcd. 6,099 (1994), *Wagenvoort Broadcasting Co.*, 35 F.C.C. 361 (1972), *In*

*In Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rule Making*,<sup>8</sup> the Commission reiterated its policy holding licensees accountable for compliance with its rules. It noted that “[t]he Commission will hold licensees directly and primarily responsible for ensuring their lessees’ compliance with the Act and applicable Commission policies and rules.”<sup>9</sup>

In sharp contrast to the Commission’s long-standing practice, the proposed Section 4.3(b) extends responsibility for outage reporting to licensees and “non-affiliated entities that maintain or provide communications systems or services used” by the licensee in providing communications services.<sup>10</sup> In assigning outage reporting responsibilities to entities other than licensees, the Commission may be extending its reach unnecessarily.<sup>11</sup> It is true that a non-affiliated entity may be sufficiently involved in the provision of communications services that the Commission has jurisdiction over it. Even so, placing the outage reporting requirement on any entity other than the licensee deprives the Commission of the benefit of the unique obligations of its licensees

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*the Matter of MariTEL Mississippi River, Inc., Licensee of Maritime Public Coast Station WPOJ535 near Pointe a la Hache, Louisiana*, File No. EB-02-OR-052, NAL/Acct. No. 200232620006, FRN0003-4734-51, 18 FCC Rcd. 1481 (rel. Feb. 3, 2003), *In the Matter of Joy Public Broadcasting Corporation, Panama City, Florida*, NAL/Acct. No. 915TP0004, 14 FCC Rcd. 11326 (rel. Jul. 7, 1999).

<sup>8</sup> *Report and Order and Further Notice of Proposed Rulemaking, Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket 00-230, 18 FCC Rcd 20604 (rel. Oct. 6, 2003) (“*Secondary Markets Order*”).

<sup>9</sup> *Secondary Markets Order*, 18 FCC Rcd 20651. The Commission will look to a lessee for compliance only when the Commission has granted an application for *de facto* leasing of a licensee’s spectrum. Even then, the licensee retains some responsibility for the lessee’s compliance. 18 FCC Rcd 20664.

<sup>10</sup> *NPRM* at Appendix A.

<sup>11</sup> As its authority for the proposed Part 4 of its rules, the Commission cited Sections 1, 4(i), 4(j), 4(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 621(b)(3) and 621(d) of the Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 154(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 621(b)(3) and 621(d), yet not one of these provisions grants authority to regulate non-affiliated entities which provide products or services to licensees. Rather, to the extent that any of these provisions authorize reporting requirements to be imposed on entities other than licensees, they are limited to demands on entities directly or indirectly controlling or controlled by, or under direct or indirect common control of, carriers or licensees. *See, e.g.*, Sections 218, 219 of the Communications Act.

concerning the Commission's rules and enforcement. By limiting the reporting obligation to licensees, the Commission creates clarity with respect to the responsibilities between licensees and contractors.<sup>12</sup>

In fact, by limiting reporting obligations to licensees, the Commission may enhance the quality of information it receives. By looking only to its licensees for outage reporting, the Commission maintains enforcement authority to ensure truthful representations. When a licensee is found to have intentionally misled the Commission, whether through misrepresentation or lack of candor, the licensee may no longer be qualified to hold a Commission license.<sup>13</sup> The D.C. Circuit has noted the “special nature of the obligation of honesty that a licensee owes to the [Commission].”<sup>14</sup> By extending the outage reporting requirement beyond the licensee, the Commission loses the opportunity to rely on licensees' special duty of honesty.

Ericsson proposes that the Commission amend its language in Section 4.3(b) to delete any reference to “non-affiliated entities that maintain or provide communications systems or services used by the provider in offering such communications.”<sup>15</sup>

## **II. The Commission Should Only Require Communications Providers to Report the Name and Type of Equipment Involved in an Outage when it has been Determined that Equipment Contributed to the Occurrence of the Outage.**

The *NPRM* proposes that communications providers report each reportable outage electronically within 120 minutes of discovering it.<sup>16</sup> The *NPRM* includes a form for initial reports,<sup>17</sup> which requires carriers to identify the “direct” and “root” causes of

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<sup>12</sup> This would be consistent with Sections 218 and 219 of the Act.

<sup>13</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179-1210-11, 1231-32 (1986).

<sup>14</sup> *Leflore Broadcasting Company, Inc.*, 636 F. 2d 454, 462 (D.C. Cir. 1980).

<sup>15</sup> 47 C.F.R. § 4.3

<sup>16</sup> *NPRM* at ¶30.

<sup>17</sup> *Id.* at Appendix B.

outages, as currently contemplated by Section 63.100 of the Commission's rules.<sup>18</sup> Thirty (30) days after discovering the outage, carriers are required to file a final report, in which they also report information set forth at Appendix B and include any information that was not contained in, or that has changed from, the information provided in initial reports. Regardless of what is specified as "direct" and "root" causes, the form at Appendix B requires identification of the "Name and Type of Equipment that Failed."<sup>19</sup>

The requirement to report the name and type of equipment that "failed" is unreasonable because it presumes, without basis, that the named equipment was the cause of the disruption. In many cases, equipment may not have been the cause of the outage, even though it may have ceased functioning when the outage occurred. Therefore, any requirement that the manufacturer and type of equipment in use during a network outage be identified before the equipment is known to be the root cause of or have contributed to the outage may inappropriately subject the equipment and its manufacturer to blame or criticism.<sup>20</sup> The resulting criticism may unfairly disadvantage a manufacturer in the competitive marketplace. It could even adversely affect a carrier using a particular type of equipment. Rather, the report form should be modified to require that licensees report the name of the manufacturer and type of equipment only if, after investigation, the equipment is found to have contributed to the occurrence of the outage. Therefore, Ericsson asks that the Commission revise the line on the second page of the form set forth at Appendix B from: "Name and Type of Equipment that Failed" to "If Equipment

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<sup>18</sup> 47 C.F.R. § 63.100.

<sup>19</sup> *NPRM* at Appendix B, p. 2.

<sup>20</sup> This situation will be exacerbated if initial outage reports, inappropriately naming the make and manufacturer of equipment in use in a network that experienced an outage, are publicly available, as contemplated by the *NPRM* at ¶ 52.

Failure Contributed to the Occurrence of the Outage, List Name and Type of Equipment that Failed.”

### **III. Conclusion.**

Ericsson supports the Commission’s objectives in promoting homeland security, network protection, and reliability. To improve its proposed rules to carry out these objectives, Ericsson asks that the Commission delete “non-affiliated entities” from Section 4.3(b) of the proposed rules so that licensees and their affiliated entities may be solely responsible for the outage reporting. The Commission should only require licensees to identify the name and type of equipment in the outage report if the equipment is found to have contributed to the occurrence of the outage.

Respectfully submitted this 25th day of May 2004.

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